No. 76-781

In the Supreme Court of the United States

OCTOBER TERM, 1976

EXXON CORPORATION AND SHELL OIL COMPANY,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-30a) is reported at 540 F. 2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1976. On November 1, 1976, Mr. Justice White extended the time within which to file a petition to and including December 9, 1976. The petition for a writ of certiorari was filed on December 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency may promulgate effluent limitations for existing industrial sources of water pollution as national minimum requirements under Section 301 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).

2. Whether the court of appeals properly refused to pass upon the interpretation and application of the variance regulations for the 1977 pollution reduction step.

3. Whether the FWPCA requires that EPA develop effluent limitations for petrochemical operations based upon limitations promulgated for organic chemical, and other non-petrochemical, operations.

STATEMENT

The Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 86 Stat. 816, 844 *et seq.*, as amended, 33 U.S.C. (Supp. V) 1311 *et seq.*, require the Administrator of the Environmental Protection Agency (EPA) to promulgate, for categories of sources, effluent limitations guidelines reflecting a technological standard of pollution control for existing sources to achieve by July 1, 1977. Sections 301(b) and 304(b), 33 U.S.C. (Supp. V) 1311(b) and 1314(b). On May 9, 1974, the Administrator promulgated such regulations for petroleum refineries. 39 Fed. Reg. 16560. The oil industry then submitted more than 1100 pages of comments on those regulations, and the Agency reconsidered them. Amended regulations were promulgated on May 20, 1975. 40 Fed. Reg. 21939.

The petroleum refining regulations divide the industry into five subcategories of similar sources, and provide effluent limitations for each pertinent pollutant within each subcategory. The applicable limitations are to be placed in permits issued to each source (Section 402 (b)(1)(A), 33

U.S.C. (Supp. V) 1342(b)(1)(A)), unless more stringent limitations are necessary to protect water quality (Section 302, 33 U.S.C. (Supp. V) 1312) or are required pursuant to water quality standards or state law (Sections 301(b)(1)(C) and 510, 33 U.S.C. (Supp. V) 1311(b)(1)(C) and 1370), or unless the source demonstrates it is entitled to a variance from the regulations.[1]

The effluent limitations guidelines for the petroleum refining industry are based upon data gathered from operating refineries in each subcategory, and represent refinery operation in every part of the country (Pet. App. A, p. 23a). They reflect the actual performance of well-operated refineries within each subcategory (Pet. App. A, p. 19a). Two of the five subcategories relate to refineries that engage in petrochemical operations. The average refinery with petrochemical operations is more complex than the average comparable non-petrochemical refinery. This fact was taken into account by the Agency and actual differences between types of refineries are reflected in the limitations for each subcategory. See 40 Fed. Reg. 21948-21949 (May 20, 1975).

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[1]Although the FWPCA does not expressly mention variances for sources seeking to comply with the 1977 effluent reduction step, the Administrator recognized that despite consideration of relevant technological and economic factors affecting subcategorization and effluent levels, some relevant data may not have been available and, as a result, the limitations might have to be adjusted for certain plants. A discharger may submit evidence to the state or federal permit issuer that factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. Limitations which are less stringent than the regulations then may be established for that discharger by the permit issuer, upon a finding that such fundamental differences exist, and upon approval by the Administrator. Whether a discharger is "fundamentally different" is determined by reference to the Development Document which accompanies each set of regulations. See, *e.g.*, 40 C.F.R. 419.12.

Petitioner Shell Oil Company, various other companies engaged in refining operations, and an oil industry organization filed timely petitions to review the FWPCA regulations promulgated by the Administrator in the United States Court of Appeals for the Tenth Circuit. Petitioner Exxon Corporation, and Shell Oil Company, filed timely petitions to review such regulations in the United States Court of Appeals for the Fifth Circuit, which petitions were transferred to the Tenth Circuit and consolidated with the petitions in that court. The petitioners challenged, *inter alia*, the Administrator's authority to promulgate national effluent limitations guidelines (Pet. Br., pp. 15-39). As a part of their argument on authority, petitioners contended that the variance provided for the 1977 pollution reduction step was inadequate (Pet. Reply Br., pp. 11-15). Petitioners also challenged the size and process configuration tables developed for the subcategories with petrochemical refineries, contending that those tables placed petrochemical refineries at a competitive disadvantage with other refineries and organic chemicals plants (Pet. Tech. Br., pp. 51-56).

The court of appeals held "that the Administrator had authority to promulgate the limitations for existing sources and that the effect of the regulations so promulgated is not contrary to the Act" (Pet. App. A, p. 11a). It found "the 1977 variance provisions [to be] a valid exercise of EPA's rule-making authority under §501(a)" (Pet. App. A, p. 16a), and held that "the regulatory variance provisions for the 1977 phase are reasonable" but "[t]heir interpretation and application must await action on a variance claim asserting specific facts" (Pet. App. A, p. 17a). The court also found that the limitations for petrochemical refineries were supported by the relevant data for the subcategories (Pet. App. A, p. 25a), that "nothing in the Act or its legislative history * * * requires EPA to consider the competitive effect of its regulations" (Pet. App. A, p. 25a), and that, in

any event, since the effluent limitations for the organic chemicals industry had been set aside by judicial action, there is no way to know "what will be the regulations applicable to that industry" (Pet. App. A, p. 24a).

ARGUMENT

As petitioners point out (Pet. 8), the question raised in their petition (*id.* at 2) regarding the Administrator's authority to promulgate national effluent limitations guidelines pursuant to Sections 301 and 304 of the FWPCA is before this Court in the context of the inorganic chemical industry in *E.I. duPont de Nemours and Co.* v. *Train*, Nos. 75-978, 75-1473 and 75-1705, certiorari granted April 19 and June 21, 1976. The Court heard oral argument in *duPont* on December 8, 1976. We therefore agree with petitioners that it would be appropriate for the Court to defer consideration of this aspect of the petition until *duPont* is decided.

In all other respects the petition should be denied.

1. The court below did not have before it any request for a 1977 reduction step variance from either of the two petitioners or from any of the other industrial parties. Despite this, petitioners seek to have this Court resolve the question whether the variance clause is too "restrictive" (Pet. 14).

The question is premature. As petitioners recognize, the Act provides for judicial review of a denial of a permit. Section 509(b)(1), 33 U.S.C. (Supp. V) 1369(b)(1) (Pet. 15). Therefore, questions regarding the scope and effect of the variance clause for the 1977 pollution reduction step should await a concrete case. As the Court of Appeals for the Second Circuit said in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 537 F. 2d 642, 647:

> It would be premature at this point to consider whether the variance clause will be interpreted with

> sufficient liberality to accommodate all legitimate demands for flexibility. Such questions should await the disclosure and development of concrete factual controversies involving a single point source and its permit.

The court below agreed with this sound approach (Pet. App. A, p. 17a) and further review is unnecessary.

2. The FWPCA requires the technology-based effluent limitations for 1977 to be based upon "the best practicable control technology currently available." Section 301 (b)(1)(A), 33 U.S.C. (Supp. V) 1311(b)(1)(A). The regulations for the petroleum refining industry are, as the court of appeals correctly held, based upon and supported by actual industry data (Pet. App. A, pp. 22a-25a). Although they do not dispute that the effluent limitations are achievable by all subcategories of refineries (Pet. App. A, p. 25a), petitioners seek to invalidate the regulations by arguing that EPA failed to consider whether certain refineries will be economically disadvantaged vis-a-vis organic chemicals plants.

First, petitioners never presented any data to the EPA showing that the regulations will have such an effect. Second, the court of appeals found that EPA did in fact consider the industry's views prior to promulgation (Pet. App. A, p. 25a); the court found that EPA had "used the same general approach in setting the limitations" for petrochemical and organic chemical operations alike (*ibid.*). Third, there are presently no organic chemical regulations to which the petroleum refining regulations may be compared.[2] Finally, as the court below correctly held (*ibid.*),

[2]The United States Court of Appeals for the Fourth Circuit set aside effluent limitations promulgated by the EPA for the organic chemicals industry, *Union Carbide Corp.* v. *Train*, 541 F. 2d 1171 (C.A. 4), a fact which the court below noted in rejecting petitioners' challenge to the present regulations (Pet. App. A, p. 24a).

the FWPCA does not require effluent limitations for one industry to be developed based upon their impact upon other industries.[3]

CONCLUSION

The Court should defer consideration of the petition in regard to the first issue presented (Pet. 2) until *duPont* is decided. The petition for a writ of certiorari should be denied in all other respects.

Respectfully submitted.

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[3]The cases relied upon by petitioners to support their proposition were shown by the court of appeals to be inapposite (Pet. App. A, pp. 24a-25a):

> Refineries' reliance on *Industrial Union Department, AFL-CIO* v. *Hodgson*, 162 U.S. App. D.C. 331, 499 F. 2d 467, and *Portland Cement Association* v. *Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F. 2d 375, cert. denied, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed. 2d 226, is misplaced. Industrial Union was involved with the Occupational Safety and Health Act. With reference to industrial standards the court said, 499 F. 2d at 480:
>
> > "Separate standards for different industries would not appear to create opportunities for employers in one industry to challenge their standards on the grounds that standards for another industry were less demanding."
>
> Portland Cement was concerned with the Clean Air Act. The court said, 486 F. 2d at 389, that "the Administrator is not required to present affirmative justifications for different standards in different industries."

Accord, *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442, 466 (C.A. 7).